

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CECIL MORTON,

CASE NO. 3:16-cv-05728-RJB

Plaintiff,

**ORDER ON REPORT AND  
RECOMMENDATION ON CROSS  
MOTIONS FOR SUMMARY  
JUDGMENT**

VANESA JOHANSON, et al.,

### Defendants.

THIS MATTER comes before the Court on the Report and Recommendation on Cross Motions for Summary Judgment of United States Magistrate Judge Theresa Fricke. Dkt. 58. The R&R considered cross motions for summary judgment by Plaintiff and Defendants. Dkts. 44, 46. The Court has considered the R&R, Plaintiff's Objections (Dkt. 64), Defendants' Response (Dkt. 69), Plaintiff's Reply (Dkt. 73), the underlying motions (Dkts. 44, 46), and the remainder of the file herein.

### *1. Factual Background.*

1       The facts are detailed and well-substantiated by the R&R, *see* Dkt. 58 at 1-5, which the  
2 Court adopts, but the Court provides the following as background to reaching the merits of  
3 Plaintiff's Objections.

4       The underlying incident for Plaintiff's §1983 Due Process claims began at an April 5,  
5 2011 in-custody disciplinary hearing, when Department of Corrections (DOC) sanctioned  
6 Plaintiff for assaulting his wife, Sharyn Morton, during a visitation. In finding that Plaintiff  
7 committed the "711 infraction," a number derived from the inmate disciplinary code, DOC: (1)  
8 revoked forty-five (45) days of good time credit; (2) sanctioned Plaintiff to nine months of  
9 administrative segregation; and (3) revoked ninety (90) days of visitation privileges. DOC  
10 thereafter terminated Plaintiff's Extended Family Visiting (EFV) privileges.

11       Plaintiff appealed the disciplinary sanction to the Washington State Supreme Court,  
12 which reversed and remanded after finding that Plaintiff had been denied the chance to present  
13 testimony of Ms. Morton at the April 5, 2011 disciplinary hearing. At a second disciplinary  
14 hearing on May 6, 2016, the 711 infraction was dismissed on procedural grounds, with no  
15 sanction imposed. *See* Dkt. 13-2 at 7 ("Due Process—continuance was not signed by the  
16 Superintendent"). DOC removed the infraction from Plaintiff's OMNI Legal Face Sheet and  
17 adjusted his early release date to restore the good time credits. Plaintiff is still in custody, and his  
18 good time credits have been restored. In the interim between the April 5, 2011 hearing and the  
19 May 6, 2016 hearing, Plaintiff was placed in administrative segregation. After the May 6, 2016  
20 hearing, Plaintiff reapplied, and was denied, EFV privileges.

21       Plaintiff's re-application for EFV privileges was prepared in May of 2016 by Defendant  
22 Donnie Rucker, Plaintiff's assigned counselor. The re-application included a reference to the 711  
23 infraction litigated at the April 5, 2011 disciplinary hearing. According to Defendant Rucker, he  
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included reference to the 711 infraction, even though it had been dismissed, because he still had safety concerns and wanted to provide context about why Plaintiff was re-applying. The re-application was submitted to a DOC panel, including Defendant Rucker, which recommended granting EFV privileges, on June 1, 2016. A DOC supervisor ultimately rejected the DOC panel's recommendation to grant EFV privileges. Prior to the DOC panel issuing its recommendation, on May 21, 2016, Plaintiff filed a grievance complaining of an unfair EFV privilege process. The administrative grievance did not name Defendant Rucker by name and was administratively denied on June 30, 2016 for the failure to "rewrite" the grievance to address certain concerns.

The Complaint alleges constitutional violations under the First, Fifth, and Fourteenth Amendments.

## 2. Discussion.

Plaintiff objects to “all adverse rulings” in the R&R, but acknowledges that “Plaintiff’s position is set out primarily in plaintiff’s summary judgment motion.” Dkt. 64 at 1. Because the Court will adopt the R&R, the Court’s ‘position’ is set out primarily in the R&R, which addressed the merits of cross motions for summary judgment. Dkt. 64. The following analysis is intended to address Plaintiff’s Objections and not rewrite analysis of the R&R.

\* \* \*

**Objection:** “The Court should reject the R&R where plaintiff submitted new evidence and new facts . . . [and thus] may consider a successive summary judgment.” Dkt. 64 at 7.

Plaintiff argues that he has offered new facts not previously available, which warrants reconsideration of prior findings. Dkt. 64 at 7. This additional evidence “change[s] this case significantly,” Plaintiff contends. Dkt. 73 at 3. Plaintiff does not detail exactly what facts are

1 newly available, or more importantly, how those facts would change the merits of the prior  
2 Order. An examination of all citations to the record given by Plaintiff (Dkt. 64 at 7) does not  
3 point to material facts ignored by the R&R in its analysis of Plaintiff's claims. *See* Dkts. 42, 53,  
4 54, 56. This objection is unavailing.

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6 **Objection:** "The Court should reject the . . . R&R as Defendant's [sic] are not entitled to  
7 summary judgment where no showing of a liberty interest is required on the Due Process claim."  
8 Dkt. 64 at 4. *See also*, Dkt. 64 at 8, 10.

9 Put differently, Plaintiff theorizes that a procedural Due Process claim can be sustained  
10 without implicating an underlying liberty interest. Not so. To invoke the procedural protections  
11 of the Due Process Clause, the plaintiff must establish that there is a deprivation of life, liberty or  
12 property without proper procedural protections. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).  
13 "A liberty interest may arise from the Constitution itself . . . , or it may arise from an expectation  
14 of interest created by state laws or policies." *Id.* Interests created by the state "will be generally  
15 limited to freedom from restraint which, while not exceeding the sentence in such an expected  
16 manner as to give rise to protection by the Due Process of its own force, nonetheless imposes  
17 atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin*  
18 *v. Conner*, 515 U.S. 472, 482 (1995).

19 Applied here, even if it is assumed that Plaintiff was denied proper procedural  
20 protections, Plaintiff has not established the deprivation of a liberty interest, considering any of  
21 the three disciplines imposed. Revoking good time credits implicates Due Process procedural  
22 protections, *Wolff v. McDonnell*, 418 U.S. 539, 564-71 (1974), the good time credits have been  
23 restored. Any constitutional errors has been corrected. Imposing administrative segregation also  
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1 may trigger some procedural protections, *Sandin*, 515 U.S. at 486, but Plaintiff has not made any  
2 showing that the conditions imposed atypical and significant hardship. Plaintiff similarly fails to  
3 show atypical and significant hardship for revocation and denial of EFV privileges, and visitation  
4 privileges do not, themselves, invoke constitutional protections. The claims cannot be sustained  
5 under procedural protections of the Due Process Clause.

6       The Court does not reach the issue of what process was due to Plaintiff for disciplines  
7 imposed.

8       Plaintiff makes several related arguments about his procedural Due Process claims. First,  
9 Plaintiff argues that the second hearing on May of 2016 gives rise to a Due Process claim,  
10 because although the 711 infraction was dismissed, Plaintiff was again denied the chance to offer  
11 testimony of Ms. Morton. Dkt. 64 at 12. Plaintiff argues that although “Plaintiff is not asserting  
12 any right to visitation . . . [he] is asserting a due process right not to have a dismissed [711]  
13 infraction used in determining his programming eligibility[.]” Dkt. 64 at 10. These arguments  
14 fail, because they presuppose, as Plaintiff previously argued, that a procedural Due Process claim  
15 can be sustained without a constitutional deprivation.

16       Plaintiff argues that he provided “proof” that the 711 infraction still exists in the  
17 “computer system and other chronos” in violation of his Due Process rights. Dkt. 64 at 11.  
18 Plaintiff cites as proof “Ex. 3 attached Plaintiff’s Reply to Defendant’s Summary Judgment,”  
19 which appears to be Dkt. 56, which has no such numbered exhibit. Plaintiff also cites to  
20 “Plaintiff’s declaration in Opposition to Defendant’s Summary Judgment ¶16,” wherein Plaintiff  
21 affirms, “I am aware that the dismissed WAC 711 2011 infraction is still in the DOC liberty  
22 computer system pursuant to DOC Policy 590.100, and other chronos, memos.” Dkt. 54 at 2.  
23 This is a self-serving statement, without any basis elsewhere in the record. But more fatally, as  
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1 the R&R reasons, “[e]ven accepting plaintiff’s assertion as true for purposes of this analysis, he  
2 presents no evidence that the reference to the infraction in some unspecified context . . . would  
3 deny him any liberty interest that would potentially support a due process claim.” Dkt. 58 at 10,  
4 11.

5 **Objection:** “There are numerous genuine issues of material fact in dispute which exist that  
6 prevent summary judgment” on Plaintiff’s First Amendment retaliation claim. Dkt. 64 at 13-21.

7 Plaintiff alleges that Defendant Rucker acted with retaliation by including a reference to  
8 the 711 infraction (which was dismissed) in Plaintiff’s EFV re-application. Plaintiff theorizes  
9 that Defendant Rucker took this action because Plaintiff filed an administrative grievance against  
10 Defendant Rucker. The R&R recommends summary judgment of dismissal because of Plaintiff’s  
11 insufficient showing as to two elements, causation and whether the action taken reasonably  
12 advanced a legitimate penological objective. Dkt. 58 at 20-29.

13 To show causation, the plaintiff must show that the protected conduct was the  
14 “substantial or motivating factor.” In the context of a retaliation claim, this can be shown that the  
15 defendant has knowledge of the protected speech, in this case, an administrative grievance, and  
16 that there is either (1) evidence of temporal proximity; (2) verbally expressed opposition by the  
17 defendant to the speech; or (3) evidence of the defendant’s stated basis for the action is  
18 pretextual. As a starting point, applied here, there is no evidence that Defendant Rucker knew of  
19 the administrative grievance. Despite Plaintiff’s representation that he intended for the grievance  
20 to target Defendant Rucker, Dkt. 64 at 14, the grievance makes no mention of Defendant Rucker  
21 by name. Dkt. 49-1 at 5.

22 Also apparent from the administrative grievance is that the grievance administrator had  
23 no broader context to imply that the administrator communicated with Defendant Rucker about  
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1 Plaintiff's EFV application. The grievance, dated May 20, 2016 and marked as received on May  
2 24, 2016, was denied administratively because "no rewrite received 6/30/16." Dkt. 49-1 at 5. A  
3 rewrite requested explanation of: "who are you grieving? Did you submit an application for  
4 EFV's? When? Was it denied or approved? Clarify what your complaint is." *Id.*

5 But even if Plaintiff could show that Defendant Rucker knew of the administrative  
6 grievance, which he has not done, as discussed in the R&R, Plaintiff has not made a showing as  
7 to temporal proximity, verbal opposition by the defendant, or pretext. *See* Dkt. 58 at 24, 25.

8 As to the next element, whether the action taken reasonably advanced a legitimate  
9 penological objective, to survive a motion for summary judgment the plaintiff must show that  
10 there was no legitimate objective to the defendant's actions. *Pratt v. Rowland*, 65 F.3d 802, 806  
11 (9<sup>th</sup> Cir. 1995). As discussed in the R&R, Defendant Rucker has provided two reasons to include  
12 reference to the 711 infraction, to explain why Plaintiff is re-applying, and because of his safety  
13 concerns. Even if, as Plaintiff argues, Defendant Rucker's reasoning has shifted since the outset  
14 of the case, as the R&R discusses, the broader context of the record, including email  
15 correspondences, supports the view that Defendant Rucker's action reasonably advanced a  
16 legitimate penological objective. Dkt. 58 at 26-29.

\* \* \*

18 The Report and Recommendation on Cross Motions for Summary Judgment (Dkt. 58) is  
19 HEREBY ADOPTED.

Plaintiff's Motion for Summary Judgment (Dkt. 44) is DENIED.

21 Defendants' Motion for Summary Judgment (Dkt. 46) is GRANTED.

22 The case is HEREBY DISMISSED.

1           The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
2 to any party appearing *pro se* at said party's last known address.

3           Dated this 13<sup>th</sup> day of June, 2018.

4             
5           ROBERT J. BRYAN

6           United States District Judge